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No. 08-1384

Supreme Court, U.S.
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In the Supreme Court of the United States

JAMES H. O'BRYAN, DONALD E. POPPE,
and MICHAEL J. TURNER,
Petitioners,

v.

HOLY SEE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should grant certiorari to review the Sixth Circuit's decision to apply the Supreme Court's holdings in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992) and *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993) in determining that the Holy See's alleged "official legislative text" was not "commercial activity" under the FSIA.

2. Whether this Court should grant certiorari to review the Sixth Circuit's decision to follow the Supreme Court's holding in *Nelson* and precedent from other circuits in relying upon the essence-of-the-complaint rule to determine which FSIA exception to apply.

3. Whether this Court should grant certiorari to review the Sixth Circuit's decision to follow *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) and its progeny in determining that the FSIA's tort exception requires the tortious act to occur in the United States.

4. Whether this Court should grant certiorari to review the Sixth Circuit's holding that petitioners waived their arguments that extending FSIA protections to the Holy See violates the First Amendment's Establishment Clause, the Seventh Amendment's right to a jury trial, and the Fifth Amendment's right to due process by failing to raise them in the district court.

PARTIES TO THE PROCEEDING

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INTRODUCTION

Petitioners fail to provide any reason that would justify a grant of certiorari review. Petitioners implicitly concede that three of the four issues they raise are not the subject of a conflict amongst the circuit courts, and erroneously claim that a conflict exists as to the fourth – whether a tort must occur in the United States under the FSIA's tort exception. In addition to failing to identify a circuit conflict, petitioners fail to provide any compelling reason justifying this Court's review of issues that are unique to petitioners' allegations.

Review by this Court is also premature. Numerous unadjudicated facial grounds for dismissal remain for consideration by the district court, including the sufficiency of the Complaint under this Court's recent decision in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) and petitioners' failure to timely file claims under the applicable Kentucky statute of limitations. Moreover, during the pendency of the appeal, petitioners moved in the district court to take the deposition of Pope Benedict XVI. Litigation over petitioners' motion revealed fundamental problems regarding petitioners' central theory that a 1962 Holy See "policy" mandated silence of child abuse complaints in the United States. The Court should not grant review unless and until the record is developed further regarding allegations that have already been undermined in the district court.

Finally, review by the Court is unwarranted because of petitioners' waiver of issues below. Petitioners waived their argument that the first two clauses of the FSIA's commercial activity exception apply and have never provided a basis for application of the third clause. Further, as the Sixth Circuit held,

petitioners waived their constitutional arguments by failing to raise them in the district court.

The Court should deny the petition for writ of certiorari.

OPINIONS BELOW

The amended opinion of the court of appeals is reported at 556 F.3d 361 and reprinted in Petitioners' Appendix ("Pet. App.") at 1a-46a. The opinion of the district court is reported at 471 F. Supp. 2d 784, Pet. App. 47a-68a.

JURISDICTION

The judgment of the court of appeals was originally entered on November 24, 2008. Petitioners' petition for rehearing was denied on February 6, 2009. The Holy See's petition for rehearing was granted on February 10, 2009, and an amended opinion of the court of appeals was filed on that date. Petitioners' petition for writ of certiorari was filed on May 7, 2009.

Petitioners invoked this Court's jurisdiction "pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 et seq., 28 U.S.C. §§ 1331 and 1332, and supplemental jurisdiction pursuant to 28 U.S.C. § 1367." Petition for Writ of Certiorari ("Cert. Petition") at 1. It appears, however, that petitioners should have properly invoked jurisdiction pursuant to 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

A. Petitioners' Complaint

Petitioners' Complaint against the Holy See,[1] a foreign sovereign, was filed on June 4, 2004. In their Complaint, petitioners conclusorily allege that they were "sexually abused, molested and assaulted by a Roman Catholic priest" in Kentucky in the "1920s" (O'Bryan), "early 1960s" (Poppe) and "mid 1970s" (Turner). Complaint ¶¶ 16-18, 63-64, 100, Pet. App. 99a-100a, 113a, 126a. The Complaint provides no other information regarding petitioners' individual claims, other than to allege that petitioner Turner had previously brought a legal action based upon the same injuries against a diocese in Kentucky, received compensation for his injuries, and released the diocese from further liability. Complaint ¶¶ 54, 92, Pet. App. 110a, 124a.

Petitioners allege that the basis for their putative class action lawsuit against the Holy See is a 1962 document "first discovered and made public in July, 2003 by news media in the United States and throughout the world." Complaint at 3, Pet. App. 90a. According to petitioners, the 1962 document[2] reveals

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[1] Although the Holy See is known colloquially as the Vatican, Holy See is the correct appellation. *Doe v. Roman Catholic Diocese of Galveston-Houston*, 408 F. Supp. 2d 272, 282 (S.D. Tex. 2005).

[2] Because the Complaint does not provide the name of the document, the Holy See will refer to it in this brief as "the 1962 document" for the sake of convenience. It is worth noting that although a purported reproduction of this document has been included by petitioners as Appendix F in support of their petition, the document in the appendix had no role in the proceedings

"the cover up" of childhood sexual abuse "mandated by the Holy See[.]" Complaint at 2-3, Pet. App. 88a-89a. Although petitioners baldly assert that the 1962 document "plainly required" bishops in the United States "to violate" child abuse reporting laws, Cert. Petition at 8, petitioners allege no fact linking the 1962 document to their individual claims. Indeed, the Complaint itself never even claims that the 1962 document was received by any diocese in Kentucky, much less that it was applied with regard to any priest who abused petitioners. *See* Complaint ¶ 45, Pet. App. 107a (stating only that the 1962 document was "privately circulated" to unidentified persons); ¶¶ 45-46, Pet. App. 107a-108a (alleging that the 1962 document sets forth "procedural norms" for addressing clergy sexual abuse of minors, yet alleging that there had not been a canonical "investigation or prosecution" of clergy sexual abuse claims in Kentucky for "at least" 60 years). Instead, petitioners' central causation allegation consists of a mere formulaic recitation of Kentucky's legal causation test. Complaint ¶ 48, Pet. App. 108a (alleging that the Holy See's "directives to conceal the sexual abuse of children committed by its clerics, agents, and employees in order to maximize revenue by avoiding scandal was a substantial factor in bringing about each Class Member's abuse"); *see also* Complaint ¶¶ 77, 110, Pet. App. 118a-119a, 131a.

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below. The document was not attached to the Complaint, was submitted to the district court by petitioners only after the hearing on the Holy See's motion to dismiss, was the subject of a timely objection by the Holy See, and was not relied upon by the district court or the court of appeals. Moreover, petitioners have never identified the source of the document; they have, for example, never claimed that it originated from Kentucky.

Petitioners' other allegations are similarly general. Their purported "commercial activity" allegations, for example, are not linked to petitioners' individual claims; rather, they are generalized allegations characterizing the Holy See's relationship with Catholic entities and individuals throughout the world. *See* Complaint ¶ 27, Pet. App. 101a-102a (alleging that the Holy See provides "religious and pastoral guidance, education and counseling services to Roman Catholics worldwide in exchange for revenues derived from its members and other financial contributors"); Complaint ¶ 47, Pet. App. 108a (alleging that the Holy See concealed the sexual abuse of children to "ensure the continued receipt of funds from its parishioners and other financial contributors, all in furtherance of [its] commercial activities").

Finally, petitioners' jurisdictional theory depends upon the imputation to the Holy See of acts of separate corporations – a fact that petitioners omit from their petition. For example, petitioners state that the Holy See "allowed abusive clergy to continue to perform as . . . priests . . . and refused to permit reporting abuse [sic] to civil or criminal authorities[,]" provided "abusive clergy the facilities and opportunity to continue their abusive conduct[,]" and "held abusive clergy out to the community as fit and competent[.]" Cert. Petition at 3-4 (citing Complaint ¶¶ 60-62, Pet. App. 112a-113a). These statements omit key language from the Complaint, namely that the above acts occurred "by and through [the Holy See's] agents[.]" *See* Complaint ¶¶ 60-62, Pet. App. 112a-113a. The only purported "agent" in the United States named in the Complaint – the Roman Catholic Bishop of Louisville, Inc. ("the Louisville Archdiocese") – is acknowledged to be a separate corporation. Complaint ¶ 66, Pet. App. 114a. Petitioners do not allege that the Holy See

exercised any type of day-to-day control over the Louisville Archdiocese or that the Holy See disregarded or abused the corporate form. Petitioners nowhere explain why it is nevertheless appropriate to impute the acts of the Louisville Archdiocese to the Holy See for jurisdictional purposes.

B. Relevant Proceedings Below

1. Motion to Dismiss Litigation

The Holy See filed a facial motion to dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1).[3] In relevant part, the Holy See's motion challenged the Complaint's assertion of FSIA jurisdiction under the waiver exception, the tort exception and all three clauses of the commercial activity exception. Central to the Holy See's jurisdictional argument was that the relevant allegations in petitioners' Complaint were too conclusory to confer subject matter jurisdiction.

Petitioners' response to the Holy See's motion addressed only the tort exception and the third clause of the commercial activity exception. In addition, petitioners did not argue in the district court that affording the protections of the FSIA to the Holy See was unconstitutional. *Cf.* Cert. Petition at 31-35.

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[3] The district court sequenced defenses to address Rule 12(b)(6) issues after the Holy See's facial subject matter jurisdiction motion had been resolved.

2. District Court Order

The district court's order granted in part and denied in part the Holy See's facial motion to dismiss. The district court rejected petitioners' attempt to confer jurisdiction under the commercial activity exception, holding that "petitioners' claims are 'clearly sounding in tort' and [that] their complaint does not allege 'property damage, breach of contract for goods or services, product liability, copyright infringement, an indebtedness yet unpaid on a loan or other transaction, or any other theory whose true essence is commercial.'" Memorandum Opinion, dated Jan. 10, 2007, Pet. App. 53a (quoting *Doe v. Holy See*, 434 F. Supp. 2d 925, 942 (D. Or. 2006)).

Analyzing petitioners' claims under the tort exception, the district court followed this Court's decision in *Amerada Hess* "'that the exception in § 1605(a)(5) covers only torts occurring within the territorial jurisdiction of the United States.'" Pet. App. 56a (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 441 (1989)). Noting that petitioners "concede that the acts of Defendant itself were all 'committed outside the United States[,]'" the district court held that jurisdiction could not lie under the tort exception for the Holy See's own alleged torts. *Id.* (quoting Pltfs' Resp. to Def. Holy See's Mot. to Dismiss for Lack of Subject Matter Juris., dated July 18, 2006, at 27). The district court stated that "[h]olding otherwise would constitute a dramatic expansion of FSIA." *Id.*

With regard to claims based upon the Holy See's alleged employees in the United States, the district court held that petitioners' allegation that the Holy See exercised "'absolute and unqualified power and control . . . over each and every priest, bishops [sic],

brother, sister, parish, diocese, archdiocese, and instrumentality of the Church'" was sufficient to allege employment status. *Id.* at 58a (quoting Complaint ¶ 20). The district court cautioned, however, that "facts may emerge during the litigation that allow the Holy See to meet its burden [of showing non-employment]" and that the court was "willing to reexamine its ruling on this issue at an appropriate time." *Id.* at 59a.

The district court also held that the scope of employment allegations were sufficient for pleading purposes. The district court determined that if such individuals "acted pursuant to a Holy See policy, these persons were acting within the scope of their employment." *Id.* at 61a. However, the district court noted that "[s]ubsequent evidence may require the Court to revisit these conclusions[.]" *Id.*

3. Appellate Briefing

To preserve its immunity from suit, the Holy See appealed the district court's ruling under the collateral order doctrine.[4] On appeal, the Holy See again argued that key allegations in the Complaint were too vague and conclusory to establish subject matter jurisdiction. In particular, the Holy See contended that the Complaint's bald assertion of "absolute and unqualified power and control" by the Holy See over Roman Catholic individuals in the United States was insufficient to show that such individuals were Holy See employees. In addition, the Holy See argued that the mere allegation that the 1962 document was a "substantial factor" in causing petitioners' injuries was insufficient. Finally, the Holy See contended that the

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[4] *See, e.g., Mitchell v. Forsyth*, 472 U.S. 511, 524-29 (1985).

Complaint's allegations failed to meet the substantive jurisdictional requirements of the FSIA's tort and commercial activity exceptions.

Petitioners responded by basing their theory of FSIA jurisdiction on the 1962 document. Asserting that the 1962 document was "central" to their claims, petitioners argued that the Holy See's challenge to the Complaint "virtually ignored . . . allegations concerning the Holy See's policy, reduced to writing in a 1962 document[.]" Pltfs' Fourth Br. on Cross-Appeal at 10; Pltfs' Second Br. on Cross-Appeal ("Pltfs' 2d Br.") at 4. Petitioners cast the 1962 document in definitive terms as "*the* 'Holy See Policy[,]'" *id.* at 7 (emphasis added), and claimed that the 1962 document "requires U.S. bishops to refuse to report clergy child sexual abuse to authorities, even though such failure is a criminal offense in most of the states." *Id.* at 11-12.

The 1962 document played a critical role in petitioners' substantive jurisdictional arguments as well. Petitioners repeatedly urged the court of appeals to use the 1962 document allegations as the basis for finding FSIA jurisdiction on the face of the Complaint under both the commercial activity exception and the tort exception. *See, e.g.*, Pltfs' 2d Br. at 34-35, 36-37, 42-43, 46.

4. Petitioners' Motion to Take the Deposition of Pope Benedict XVI During the Pendency of the Appeal

During the pendency of the appeal, petitioners moved in the district court under Federal Rule of Civil Procedure 27 to take the deposition of Pope Benedict XVI – the first deposition from the Holy See that petitioners requested in this case. Petitioners based

their request for the Pope's deposition largely on their stated need to obtain testimony regarding the 1962 document. In support of their motion, petitioners provided a declaration from canon lawyer Thomas P. Doyle, which attached as an exhibit an unofficial translation of the 1962 document. In his declaration, Doyle stated that "**Pope Benedict XVI is the only living person who knows how the 1962 decree, *Crimen Sollicitationis*, was decreed, disseminated and enforced by his predecessor Popes, and particularly how it was enforced during his term as head of the CDF** [Congregation for the Doctrine of the Faith]." Decl. of Thomas P. Doyle, dated Apr. 7, 2008 ("Doyle Decl.") ¶ 10 (bold in original). Doyle's declaration, however, was silent as to any connection between the 1962 document and petitioners' individual claims.

In opposition to petitioners' motion to take Pope Benedict XVI's deposition, the Holy See argued that the request was barred by, *inter alia*, head of state immunity, the doctrine of inviolability, territorial sovereignty and international comity. The Holy See also opposed the proffered factual basis for petitioners' motion. The Holy See demonstrated that Doyle – petitioners' own canon law expert – had in prior testimony and publications contradicted the 1962 document theories at the heart of petitioners' Complaint. For example, whereas petitioners claim that the 1962 document mandated "secrecy" in order to "ensure the continued receipt of funds from its parishioners" (Complaint ¶¶ 45, 47, Pet. App. 107a-108a), Doyle had previously explained that the 1962 document's confidentiality provisions were "primarily rooted in the fact that [the document] deals with the sacrament of penance to which is attached inviolable secrecy." Thomas P. Doyle, *The 1962 Vatican*

Document on Solicitation in the Confessional (Aug. 10, 2003) at 2, attached as Ex. A to the Decl. of Jeffrey S. Lena in Supp. of Def. Holy See's Resp. to Pltfs' Mot. for Leave to Take Depo. to Perpetuate Testimony, dated Aug. 11, 2008 ("Lena Decl."). Doyle had also stated that the confidentiality that "was (and still is) imposed on parties and witnesses in canonical proceedings is intended to assure witnesses that they can speak freely. It is also intended to protect the reputations of the accused and accuser until guilt or innocence is determined." *Id.* These are, of course, some of the goals of the United States grand jury process,[5] a comparison that Doyle himself has repeatedly made. *See, e.g.*, Depo. of Thomas P. Doyle in *The Clergy Cases III*, Alameda County Super. Ct. Coord. Proc. No. 4359, taken on Aug. 26, 2005 ("Doyle Aug. 26, 2005 Depo.") at 95, attached as Ex. E to the Lena Decl. ("It's similar to a grand jury where there's – you know, secrecy is imposed in a grand jury . . . .").

Doyle had also previously rejected petitioners' "cover up" theory. In fact, he stated that those espousing a "cover up" theory based upon the 1962 document "don't know what [they're] talking about" and have "misconstrued the document, misunderstood it." Depo. of Thomas Doyle in *John Doe v. Catholic Archbishop of Seattle*, Spokane County Super. Ct. Case No. 03-2-06469-1, taken on Sep. 23, 2004, at 113, attached as Ex. F. to the Lena Decl. As for petitioners' core claim that the 1962 document mandated non-compliance with state child abuse reporting statutes,

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[5] *See, e.g., Illinois v. Abbott & Assoc., Inc.*, 460 U.S. 557, 567 n.11 (1983) (stating that federal grand jury secrecy encourages "persons to testify fully and freely" and "protects the reputations of the innocent").

Doyle testified that the 1962 document "doesn't say that." Doyle Aug. 26, 2005 Depo. at 94. In fact, Doyle has explained that "[t]he Code of Canon Law is not a substitute for the civil law systems of the various countries where the Church is established. It does not 'trump' civil law." Decl. of Thomas Doyle in *The Clergy Cases I*, L.A. County Super. Ct. Coord. Proc. No. 4286, dated May 30, 2006, at 6, attached as Ex. G to the Lena Decl. According to Doyle, "nothing" in the 1962 document could be interpreted to "prohibit[] a bishop or religious superior from notifying civil authorities of an allegation prior to the initiation of the canonical process." Thomas Doyle, *The 1962 Vatican Instruction* (Nov. 1, 2006) at 9, attached as Ex. I to the Lena Decl. Given that petitioners allege that a canonical process has not occurred in Kentucky in over 60 years (Complaint ¶ 46, Pet. App. 107a-108a), Doyle's testimony contradicted petitioners' theory that the 1962 document's confidentiality provisions caused non-reporting of child abuse by the Louisville Archdiocese.

Finally, the Holy See noted that Doyle had identified no evidence of the 1962 document's use in Kentucky. In fact, although Doyle claimed to have studied documentation from 97% of U.S. dioceses and reviewed "more than 1,500 priest personnel files," Doyle Decl. ¶ 5, Doyle has stated that "no documentary evidence produced by dioceses in civil cases between 1985 and the present contained any reference to this document or any indication that the prescribed norms were ever followed." Thomas Doyle, et al., *Canonical History of Clerical Sexual Abuse: An Overview* 60 (2004), attached as Ex. R to the Lena Decl.; *see also, e.g.*, Decl. of Thomas Doyle in *Melanie H. v. Defendant Doe 1*, Case No. 04 CV 1596 WQH (JFS) (S.D. Cal. Aug. 8, 2005) at 16-17, attached as Ex. S to the Lena Decl. ("there is little if any evidence that the document

was ever referred to in any of the hundreds of civil cases brought against dioceses and religious communities over the past 15 years").

Faced with Doyle's prior statements, petitioners submitted another declaration from Doyle on reply – which notably did not repudiate any of his prior testimony or publications. In connection with their reply, petitioners also still provided no evidence that showed that the 1962 document was ever used in Kentucky, much less in connection with the priests alleged to have abused petitioners. Moreover, petitioners did not explain how the canonical investigative and prosecutorial provisions set forth in the 1962 document could have been applied when no canonical investigation or prosecution ever took place in Louisville. Complaint ¶ 46, Pet. App. 107a-108a.

The district court denied petitioners' motion to take Pope Benedict XVI's deposition on October 21, 2008.

5. The Court of Appeals' November 24, 2008 Opinion and the Parties' Petitions for Rehearing

On November 24, 2008, the court of appeals affirmed the district court's order granting in part and denying in part the Holy See's facial motion to dismiss for lack of subject matter jurisdiction.[6] In light of petitioners' repeated descriptions of the 1962 document as "the Holy See Policy" and the "basis" of their claims, the Sixth Circuit found that "all of the

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[6] This section provides a description of the Sixth Circuit's opinion that is limited to petition for rehearing issues. A more complete discussion of the Sixth Circuit's relevant holdings is provided below.

claims advanced by plaintiffs stem from the promulgation of the purported 1962 Policy by the Holy See." Opinion, dated November 24, 2008 ("Nov. 24, 2008 Op.") at 12. Just like petitioners' "Statement of Facts" in their opening brief on appeal, the Sixth Circuit's factual discussion quoted the Complaint's key language regarding the 1962 document. *Compare id.* at 2-3 *with* Pltfs' 2d Br. at 7-8. Moreover, as petitioners had urged, the court of appeals relied on the Complaint's 1962 document allegations to resolve substantive jurisdictional issues. *See* Nov. 24, 2008 Op. at 12 (commercial activity exception), 17 (situs), 18-19 (discretionary function exception).

Petitioners filed a petition for panel rehearing.[7] On the heels of the district court litigation wherein the Holy See demonstrated that petitioners' canon law expert had previously disagreed with petitioners' 1962 document theories, petitioners now argued that the court of appeals' conclusions regarding the significance of the 1962 document to petitioners' case were based upon a "misperception[.]" Plaintiffs-Appellees, Cross-Appellants' Pet. for Panel Reh'g, dated Dec. 22, 2008 ("Pltfs' Pet. for Reh'g") at 6. Indeed, petitioners argued that even "to *imply* that all of the claims made by [petitioners] stem from the 1962 policy would be *inaccurate*[.]" Plaintiffs-Appellees, Cross-Appellants' Response to the Holy See's Mot. for Leave to Resp. to Pet. for Panel Reh'g, dated Jan. 6, 2009, at 1 (emphasis added). Petitioners now claimed that they only "mentioned" the 1962 document in the Complaint because it "resulted in the public revelation" of the Holy See's "direct involvement" in the handling of

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[7] In their petition for writ of certiorari, petitioners omitted any mention of the petition for rehearing litigation.

clergy child sexual abuse. Pltfs' Pet. for Reh'g at 7. And in contrast to petitioners' own appellate briefing – which relied extensively on the 1962 document for petitioners' substantive jurisdictional arguments – petitioners now sought to eliminate material references to the 1962 document from the court of appeals' jurisdictional analysis. *Id.* at 8-9.

The Holy See also filed a petition for rehearing. Describing the burden-shifting regimen under the FSIA, the Sixth Circuit had stated in its opinion that a foreign sovereign is required to make a *prima facie* showing "'that the plaintiff's claim relates to a public act of the foreign state – that is, an act not within the exceptions in sections 1605-1607.'" Nov. 24, 2008 Op. at 8 (quoting *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 452 n.5 (6th Cir. 1988)). Based upon this Court's decision in *Nelson* and precedent from other circuits, the Holy See noted that foreign states do not have a *prima facie* burden of showing that a plaintiff's claims arose out of a "public act" or that the FSIA's exceptions do not apply. Appellant/Cross-Appellee Holy See's Pet. for Reh'g and Reh'g En Banc, dated Dec. 23, 2008.

The court of appeals denied petitioners' petition for rehearing[8] and granted the Holy See's petition for rehearing. The Sixth Circuit filed an amended opinion that deleted the reference to a foreign state's *prima facie* burden of showing a "public act" or the non-

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[8] Petitioners at one point state that "[a]lthough the Sixth Circuit focused on the 1962 mandate, in fact, the Holy See's policies and procedures enforcing silence regarding clergy-child sex abuse existed long before and were simply reissued in 1962." Cert. Petition at 15 n.3. That is, of course, what the court of appeals rejected on rehearing – which petitioners neglect to mention in their petition for certiorari.

applicability of FSIA exceptions. *See* Amended Opinion, dated Feb. 10, 2009, Pet. App. 17a-18a.

6. The Court of Appeals' February 10, 2009 Amended Opinion

Relying upon their reading of the Oregon district court's opinion in *Doe v. Holy See*, 434 F. Supp. 2d 925 (D. Or. 2006), petitioners argue that the Sixth Circuit erred in holding that religious activity is not commercial activity. *See* Cert. Petition at 18 ("[T]he Sixth Circuit's conclusion that the Holy See's conduct is sovereign is clearly erroneous. Exempting the Holy See's conduct from the commercial activity exception due to its 'intrinsically religious' nature is not authorized by the express language or purpose of the FSIA, this Court's decision in *Weltover*, and as discussed below, the United States Constitution."); *id.* at 21 ("Under the Sixth Circuit's analysis, the conclusion that the Holy See's conduct was not subject to the commercial activity exception ignores the private, nonsovereign nature of the conduct . . . . Nothing indicates that Congress intended the FSIA to immunize religious conduct as sovereign.").

Petitioners' argument mischaracterizes the Sixth Circuit's opinion. The Sixth Circuit nowhere held that the Holy See's activities do not meet the requirements of the commercial activity exception because they are "intrinsically religious."[9] Instead, the court of appeals found that "all of the claims advanced by plaintiffs stem from the promulgation of the purported 1962 Policy by the Holy See" (Pet. App. 28a) – a "policy" that

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[9] Even the *Doe* district court itself did not reach that conclusion. *Doe*, 434 F. Supp. 2d at 941-42.

petitioners themselves allege was "'an official legislative text, issued by the Congregation of the Holy Office and specifically approved by Pope John XXIII.'" Pet. App. 4a (quoting Complaint ¶ 45). Based upon this Court's holdings in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992) and *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), the court of appeals therefore concluded that petitioners' claims did not stem from private, commercial conduct. Pet. App. 27a-28a.[10]

More significantly, though, the court of appeals agreed with the district court and the *Doe* court that the "essence" of petitioners' claims was not commercial:

> the gravaman of plaintiffs' claims is the tortious conduct of priests which was allegedly facilitated by the tortious conduct of Holy See employees. Thus to allow plaintiffs to obtain jurisdiction under the commercial activity exception through a semantic ploy would allow them to "obtain jurisdiction over a claim that Congress did not intend to be brought against a foreign sovereign." We therefore conclude that the commercial activity exception does not apply.

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[10] The court of appeals' conclusion was well in line with this Court's precedent. *See, e.g., Nelson*, 507 U.S. at 362 (quoting Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INT'L L. 220, 225 (1952)) ("'[S]uch acts as legislation . . . cannot be performed by an individual acting in his own name. They can be performed only by the state acting as such.'").

Pet. App. 28a (quoting *Leutwyler v. Office of Her Majesty Queen Rania Al Abdullah*, 184 F. Supp. 2d 277, 299 (S.D.N.Y. 2001)). The Sixth Circuit's holding that the commercial activity exception did not apply, in other words, turned on the *tortious* nature of petitioners' claims, not their religious nature.

Second, with regard to the situs of the tort, the court of appeals followed this Court's decision in *Amerada Hess*, as well as decisions of the Second Circuit and the D.C. Circuit, to hold that the FSIA's tort exception only permits jurisdiction over torts occurring in the United States. Pet. App. 31a.

Third, the Sixth Circuit held that petitioners had waived their argument that the FSIA could not be constitutionally applied to the Holy See by failing to raise it in the district court. Pet. App. 16a. The court of appeals found no "exceptional circumstances" excusing petitioners' waiver. Pet. App. 16a n.5.

REASONS FOR DENYING THE WRIT

I. Certiorari Should Be Denied Because No Conflict Exists Amongst the Circuit Courts as to Any of the Issues Raised

The petition for writ of certiorari raises four issues. Because there is no conflict amongst the circuit courts as to any of the issues, the petition should be denied.

A. Petitioners Do Not Claim that a Conflict Exists Amongst the Circuit Courts as to Three of the Four Issues Raised in Their Petition

Petitioners do not claim a conflict amongst the circuit courts as to three of the four issues they raise.

First, petitioners do not claim that there is a conflict regarding the Sixth Circuit's holding that the Holy See's alleged policy regarding sexual abuse is not "commercial activity."[11] Second, petitioners do not argue that there exists a conflict with regard to whether applying the FSIA to the Holy See violates the Constitution.[12]

Third, with regard to their "gravamen" argument, petitioners correctly acknowledge that a "growing number of courts" apply the essence-of-the-complaint rule adopted by the Sixth Circuit. Cert. Petition at 22. The gravamen approach was applied by this Court in *Nelson* and has been used by the Second, Fifth, Seventh and Ninth Circuits. *Nelson*, 507 U.S. at 363; *see also, e.g., Garb v. Republic of Poland*, 440 F.3d 579, 588 (2d Cir. 2006); *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1106 (9th Cir. 1990); *De Sanchez v.*

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[11] Throughout their petition, petitioners repeatedly state that part of the inquiry under the commercial activity exception is whether the activity is "public" or "private." *See, e.g.*, Cert. Petition at 12. That is incorrect. Under the plain language of the statute, the inquiry is whether the activity is "commercial." 28 U.S.C. 1605(a)(2); 28 U.S.C. 1603(d); *see also Weltover*, 504 U.S. at 615 ("the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in '*trade and traffic or commerce*[.]'") (emphasis added) (citations omitted); *cf. Phaneuf v. Republic of Indonesia*, 106 F.3d 302, 306 (9th Cir. 1997) ("Requiring a foreign state to prove a public act conflicts with the plain language of the statute: a foreign state is immune from suit unless one of the enumerated exceptions applies. There is no exception for non-public acts.")

[12] Courts have, in fact, long applied the FSIA to the Holy See. *See, e.g., Doe v. Holy See*, 557 F.3d 1066 (9th Cir. 2009); *Dale v. Colagiovanni*, 443 F.3d 425 (5th Cir. 2006); *English v. Thorne*, 676 F. Supp. 761 (S.D. Miss. 1987).

Banco Central de Nicaragua, 770 F.2d 1385, 1398-99 (5th Cir. 1985); *Alberti v. Empresa Nicaraguense de la Carne*, 705 F.2d 250, 254 (7th Cir. 1983). Moreover, all three federal courts to reach the issue have concluded that the gravamen rule precludes application of the commercial activity exception in cases against the Holy See involving sexual abuse claims. *See* Pet. App. 28a (panel decision); Pet. App. 53a (district court opinion); *Doe*, 434 F. Supp. 2d at 942.[13] Petitioners provide no reason why this Court should grant certiorari to review an issue that has been the subject of consensus in FSIA jurisprudence.

B. Petitioners Erroneously Claim that a Circuit Conflict Exists Regarding Whether the Tort Must Occur in the United States Under the Tort Exception

Petitioners claim that a "conflict exists" with regard to whether a tort must occur in the United States in order to fall within the FSIA's tort exception. Cert. Petition at 27. The claim is incorrect: no circuit conflict exists.

First, the rule applied by the Sixth Circuit is compelled by this Court's decision in *Amerada Hess*, which held that the tort exception "covers only torts occurring within the territorial jurisdiction of the United States." *Amerada Hess*, 488 U.S. at 441. Petitioners' characterization of the language in *Amerada Hess* as *dictum* is erroneous. In the relevant

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[13] *See also English*, 676 F. Supp. at 763 (in case against Holy See alleging clerical sexual abuse, listing FSIA exceptions and holding that "the immunity exception upon which plaintiffs *must* rely is [the tort exception]") (emphasis added).

part of the opinion, the *Amerada Hess* Court rejected an argument that mere injury in the United States – the claimed loss of property resulting from disrupted contractual payments due in New York – could confer jurisdiction under the tort exception. *Id.* The Court did not reject the argument on the basis that the alleged injury was insufficient under the tort exception; instead, the Court rejected the argument because the tort exception required the tort to occur within the United States. *Id.* Since the conclusion regarding the locus of the tort was essential to the decision, the language states a holding, not *dictum*. *See, e.g., Cabiri v. Gov't of Republic of Ghana*, 165 F.3d 193, 200 n.3 (2d Cir. 1999) (stating that the *Amerada Hess* Court "*held* that this exception 'covers only torts occurring within the territorial jurisdiction of the United States'") (emphasis added); *Wolf v. Fed. Republic of Germany*, 95 F.3d 536, 542 (7th Cir. 1996) (same).

The two cases cited by petitioners for the proposition that a conflict exists – *Letelier v. Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980) and *Olsen v. Gov't of Mexico*, 729 F.2d 641 (9th Cir. 1984) – are both pre-*Amerada Hess* decisions. Moreover, *Letelier* was subsequently rejected by the D.C. Circuit. *See Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 842-43 (D.C. Cir. 1984); *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1524-25 (D.C. Cir. 1984); *see also Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 379-80 (7th Cir. 1985) (stating that the *Letelier* court's interpretation was "rejected by the Court of Appeals for that circuit"). In addition, after *Amerada Hess*, the Ninth Circuit has made statements that call into question whether *Olsen* remains good law. *See, e.g., Sec. Pac. Nat'l Bank v. Derderian*, 872 F.2d 281, 285 n.8 (9th Cir. 1989) (citing *Amerada Hess*, 109 S. Ct. at 688-91) (stating that the

tort exception "requires not only that personal injury or property damages occur in the United States, but that the tortious act or omission occur here"); *see also Doe v. Holy See*, 557 F.3d 1066, 1085 n.11 (9th Cir. 2009) ("we have no occasion to consider whether the entire tort must occur in the United States, as the Sixth and D.C. Circuits have held").

In any event, the weight of authority after *Amerada Hess* is overwhelming: courts agree that the tortious act or omission must occur in the United States to fall within the tort exception, just as the court of appeals held below. *See Cabiri*, 165 F.3d at 200 n.3; *Wolf*, 95 F.3d at 542; *Jones v. Petty-Ray Geophysical Geosource, Inc.*, 954 F.2d 1061, 1065 (5th Cir. 1992); *Abrams v. Societe Nationale des Chemins de Fer Francais*, 175 F. Supp. 2d 423, 431 (E.D.N.Y. 2001), *vacated on other grounds by* 332 F.3d 173 (2d Cir. 2003), *cert. granted and vacated*, 542 U.S. 901 (2004), *aff'd* 389 F.3d 61 (2d Cir. 2004); *Sampson v. Fed. Republic of Germany*, 975 F. Supp. 1108, 1118 (N.D. Ill. 1997); *S. Seafood Co. v. Holt Cargo Sys., Inc.*, No. Civ.A.96-5217, 1997 WL 539763, at *7 (E.D. Pa. Aug. 11, 1997); *Cabiri v. Gov't of Republic of Ghana*, 981 F. Supp. 129, 132 (E.D.N.Y. 1997), *aff'd in part and rev'd on other grounds in* 165 F.3d 193 (2d Cir. 1999); *Hirsh v. State of Israel*, 962 F. Supp. 377, 383-84 (S.D.N.Y. 1997); *Rein v. Rein*, No. 95 Civ. 4030 (SHS), 1996 WL 273993, at *3 (S.D.N.Y. May 23, 1996); *Coleman v. Alcolac, Inc.*, 888 F. Supp. 1388, 1403 (S.D. Tex. 1995); *Smith v. Socialist People's Libyan Arab Jamahiriya*, 886 F. Supp. 306, 313 (E.D.N.Y. 1995); *El-Fadl v. Cent. Bank of Jordan*, No. Civ.A. 93-1895 RMU, 1994 WL 1656111, at *4 (D.D.C. Nov. 9, 1994); *Velasquez v. Gen. Consulate of Mexico*, No. C-92-3745 CFL, 1993 WL 69493, at *3 (N.D. Cal. Mar. 4, 1993); *Intercont'l Dictionary Series v. De Gruyter*, 822 F. Supp. 662, 677 (C.D. Cal. 1993),

disapproved on other grounds in Sun v. Taiwan, 201 F.3d 110 (9th Cir. 2000); *Denegri v. Republic of Chile*, Civ. A. No. 86-3085, 1992 WL 91914, at *2 (D.D.C. Apr. 6, 1992); *Antares Aircraft L.P. v. Fed. Republic of Nigeria*, No. 89 Civ. 6513 (JSM), 1991 WL 29287, at *4 (S.D.N.Y. Mar. 1, 1991); *Polanco v. Dominican Republic*, No. 90 Civ. 7089 (WK), 1991 WL 146306, at *2 (S.D.N.Y. July 22, 1991); *Fickling v. Commw. of Australia*, 775 F. Supp. 66, 72 (E.D.N.Y. 1991); *Von Dardel v. Union of Soviet Socialist Republics*, 736 F. Supp. 1, 7-8 (D.D.C. 1990); *Goquiolay v. Philippines Nat'l Bank*, No. 90 CIV. 893 (CSH), 1990 WL 144118, at *3 (S.D.N.Y. Sept. 28, 1990); *Bennett v. Stephens*, CIV. A. No. 88-2610 (RCL), 1989 WL 17751, at *4 (D.D.C. Feb. 23, 1989).[14]

There is, in short, no circuit conflict with regard to whether the tort must occur in the United States to satisfy the tort exception's requirements. Because the only conflict identified by petitioners does not exist, the petition should be denied.

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[14] Even before *Amerada Hess*, the consensus was that the tortious act or omission had to occur within the United States. *Frolova* 761 F.2d at 379-80; *Asociacion de Reclamantes*, 735 F.2d at 1524; *Persinger*, 729 F.2d at 842; *Kline v. Kaneko*, 685 F. Supp. 386, 391 (S.D.N.Y. 1988); *Four Corners Helicopters, Inc. v. Turbomeca S.A.*, 677 F. Supp. 1096, 1102 (D. Colo. 1988); *Ledgerwood v. State of Iran*, 617 F. Supp. 311, 314 (D.D.C. 1985); *Kline v. Republic of El Salvador*, 603 F. Supp. 1313, 1315-16 (D.D.C. 1985); *Evans v. Petroleo*, Civil Action No. H-83-91, 1984 WL 1887, at *1 (S.D. Tex. Aug. 2, 1984); *In re Sedco, Inc.*, 543 F. Supp. 561, 567 (S.D. Tex. 1982); *see also* H.R. REP. NO. 1487, at 21 (1976) ("the tortious act or omission must occur within the jurisdiction of the United States"); *English*, 676 F. Supp. at 764 (applying tort exception's situs rule in case against Holy See arising out of sexual abuse claim).

II. Certiorari Should be Denied Because Petitioners Have Failed to Identify Any Compelling Reason Justifying this Court's Review

In addition to not identifying a circuit conflict, petitioners provide no compelling reason justifying this Court's grant of certiorari. Supreme Court Rule 10. The issues raised by petitioners turn on the Complaint's allegations regarding the 1962 document and on the imputation of acts of the Louisville Archdiocese to the Holy See. The issues are unique to petitioners' Complaint; they are not matters of national importance.[15]

Petitioners urge consideration of the effect that the Sixth Circuit's decision may have on "class members" who have already settled lawsuits and released bishops in the United States, Cert. Petition at 28, but petitioners have not yet moved for, much less obtained, class certification. This is currently an action brought by three individual plaintiffs, not a class, and only the interests of those three individuals are properly before the Court. *See, e.g., Baxter v. Palmigiano*, 425 U.S. 308, 312 n.1 (1976) ("Without such certification [under Rule 23] and identification of the class, the action is

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[15] The Holy See recently filed a petition for a writ of certiorari in the only other pending case against the Holy See involving claims of child sexual abuse. *See Holy See v. Doe*, No. 09-1 (U.S. filed June 25, 2009). There is one plaintiff in *Doe*, and the case does not involve any allegations regarding the 1962 document. Moreover, the issue of national importance raised by the Holy See's petition for a writ of certiorari – whether a foreign sovereign can be stripped of immunity based upon a vicarious liability rule that is contrary to the FSIA's jurisdictional requirements – is not at issue in the instant case.

not properly a class action."); *Cruz v. Farquharson*, 252 F.3d 530, 534 (1st Cir. 2001) ("Only when a class is certified does the class acquire a legal status independent of the interest asserted by the named plaintiffs . . . ."); *McKenzie v. City of Chicago*, 118 F.3d 552, 555 (7th Cir. 1997) ("Because a class has not been certified, the only interests at stake are those of the named plaintiffs.").

Given that the issues raised by petitioners are not of general significance, certiorari should be denied.

III. Certiorari Should be Denied Because There Remain Numerous Unadjudicated Facial Grounds for Dismissal

Certiorari is not appropriate given that petitioners' Complaint is subject to numerous unadjudicated facial grounds for dismissal.

The district court and the court of appeals held that petitioners' jurisdictional allegations were sufficient under the FSIA's tort exception to withstand a facial Rule 12(b)(1) challenge. However, in light of this Court's intervening decision in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), the sufficiency of petitioners' Complaint for purposes of subject matter jurisdiction is once again an open question. For example, the district court and the appellate court accepted as true petitioners' allegation that the Holy See exerts "absolute and unqualified power and control . . . over each and every priest, bishop, brother, sister, parish, diocese, archdiocese, and instrumentality of the Church" in the United States to find that petitioners had sufficiently alleged employment under the FSIA's tort exception. Complaint ¶ 20, Pet. App. 100a. The lower courts also deemed sufficient petitioners' bare assertion that the 1962 document was a "substantial

factor" in causing petitioners' injuries. Complaint ¶ 48, Pet. App. 108a. Given this Court's recent holding in *Iqbal* that conclusory allegations should not be taken as true, 129 S. Ct. at 1950, the law of the case regarding the sufficiency of petitioners' pleading is now unsettled. *See, e.g., Davis v. United States*, 417 U.S. 333, 342 (1974) (holding that court of appeals erred in adhering to law of the case doctrine despite intervening Supreme Court precedent). The issue will need to be resolved by the lower court in the first instance. *See, e.g., Hunter v. Hydrick*, 129 S. Ct. 2431 (2009), *remanding for further consideration in light of Iqbal* 500 F.3d 978 (9th Cir. 2007).

Second, the Holy See intends to challenge the sufficiency of petitioners' Complaint under Rule 12(b)(6).[16] As with a renewed facial 12(b)(1) challenge, a challenge under Rule 12(b)(6) will address the sufficiency of petitioners' Complaint in light of *Iqbal* – including whether petitioners' bare assertions of injury by the Holy See's "policy," and that diocesan bishops in the United States are Holy See "employees," are sufficient. The Holy See also intends to raise, *inter alia*, statute of limitations and release defenses in a Rule 12(b)(6) motion. All three petitioners waited decades after their injuries before filing suit against the Holy See, and Kentucky appellate courts have barred child abuse suits under statute of limitations provisions in similar circumstances. *See, e.g., Moyers v. Roman Catholic Bishop of Louisville*, No. 2004-CA-001886-MR, 2005 WL 3116116, at *5 (Ky. App. Nov. 23, 2005). In addition, petitioner Turner

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[16] As noted above, Rule 12(b)(6) issues were preserved until the Holy See's facial subject matter jurisdiction challenge was resolved.

released the Holy See's putative "employee" – the Louisville Archbishop – in 2004; under Kentucky law, that release should operate in favor of the Holy See. *See, e.g.*, *Waddle v. Galen of Ky., Inc.*, 131 S.W.3d 361, 366 (Ky. App. 2004); *see also* Cert. Petition at 28.

Given the upcoming potentially-dispositive litigation, there is no reason for this Court to review the court of appeals' decision now. The Holy See brought an immediate appeal of the district court's decision in order to preserve its immunity from suit; as this Court has recognized in the immunity context, such appeals are appropriate under the collateral order doctrine. *Iqbal*, 129 S. Ct. at 1945-46. Petitioners, on the other hand, can appeal any adverse rulings once final judgment is entered. At that stage, petitioners can argue that review by this Court is appropriate; for now, however, any such argument is premature.

IV. Certiorari Should Be Denied Because Petitioners' Claims Regarding Both the 1962 Document and the Imputation of Acts of Separate Corporations to the Holy See are Not Ripe for this Court's Review

Even assuming that the Complaint can survive a subsequent purely legal challenge, recent developments have revealed that petitioners' case has other significant jurisdictional problems.

The litigation during the pendency of the appeal – which was initiated when petitioners moved to take Pope Benedict XVI's deposition – demonstrated fundamental problems in petitioners' 1962 document theories. Notwithstanding the extraordinary nature of petitioners' request, petitioners were unable to produce evidence linking their injuries to any Holy See action,

including the 1962 document. In fact, petitioners' own expert had previously rejected all of petitioners' central contentions regarding the 1962 document, including (a) that the 1962 document's confidentiality provisions were intended to "ensure the continued receipt of funds" from parishioners, (b) that the document is evidence of a worldwide "cover up" by the Holy See and (c) that the 1962 document "mandated" non-compliance with state child abuse reporting statutes. *See supra* pp. 10-12.

This Court should not grant certiorari under these circumstances. Before reaching the issue of whether the 1962 document could constitute "commercial conduct" for purposes of FSIA jurisdiction, the Court should afford the court below the opportunity to determine whether petitioners can even meet their burden of producing evidence of a link between the 1962 document and their claims. *See* Pet. App. 17a-18a (panel decision) (stating that petitioners have the burden of producing evidence showing that an FSIA exception applies). After all, if petitioners cannot sustain their claims regarding the 1962 document, the first three questions petitioners raise in their petition would be hypothetical. *See, e.g., Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 118 (1994) (certiorari improvidently granted where constitutional question "may be entirely hypothetical").

Even if petitioners were able to surmount all of the problems identified above, this case would still require further development with regard to whether the acts alleged by petitioners are even attributable to the Holy See. For purposes of pleading, the district court and the Sixth Circuit accepted petitioners' bare allegation that bishops and other clerics in the United States were Holy See employees. However, the district court noted that "facts may emerge during the litigation that

allow the Holy See to meet its burden [of showing non-employment]" and that the court was "willing to reexamine its ruling on this issue at an appropriate time." Pet. App. 59a.[17] As the Ninth Circuit recently held, acts by dioceses in the United States are not attributable to the Holy See absent day-to-day control or an *alter ego* relationship. *See Doe*, 557 F.3d at 1080 (rejecting FSIA jurisdictional theory based on allegations that "the actions of the domestic corporations are attributable to the Holy See"); *see also, e.g., First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 626-27 (1983). This Court should not resolve whether the activities alleged by petitioners – such as providing educational or counseling "services" – satisfy the commercial activity exception until petitioners meet their burden of producing evidence that there is an agency or *alter ego* relationship upon which to attribute the alleged acts.

In short, this case is not ripe for the Court's review.

V. Certiorari Should Be Denied Because Petitioners Waived Their Arguments that the First Two Clauses of the FSIA's Commercial Activity Exception Apply and Have Not Provided Any Basis for Application of the Third Clause

Petitioners waived their argument that jurisdiction lies under the first two clauses of the commercial

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[17] Of course, under the Sixth Circuit's amended opinion and the FSIA's burden-shifting regimen, petitioners are the ones who will have the burden of production as to the employment issue. Pet. App. 17a-18a.

activity exception. While petitioners' Complaint alleges jurisdiction under all three clauses (Complaint ¶ 2, Pet. App. 92a; Pet. App. 53a (district court opinion)), petitioners did not contest the Holy See's arguments in the district court that neither of the first two clauses applied. Further, petitioners nowhere asserted in their district court briefing that jurisdiction could lie under the first two clauses. Petitioners' failure to raise these arguments in the lower court resulted in waiver. *See, e.g., Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("Ordinarily, this Court does not decide questions not raised . . . in the lower court.").

Petitioners have also never provided any basis for application of the commercial activity exception's third clause. Given that the alleged educational and counseling "programs" – the supposed "commercial activity" – occurred in the United States, it is unclear what commercial activity "elsewhere" petitioners claim satisfies the third clause. *See* 28 U.S.C. 1605(a)(2) ("in connection with a commercial activity of the foreign state *elsewhere*") (emphasis added); *see also, e.g.*, H.R. REP. No. 94-1487, at 19 (stating that third clause embraces "commercial conduct abroad having a direct effect in the United States"). Moreover, petitioners cannot satisfy the third clause's requirement that an act of the Holy See "cause[d] a direct effect in the United States[.]" 28 U.S.C. 1605(a)(2). An effect is direct "only if it follows as an immediate consequence of the defendant's . . . activity." *Weltover*, 504 U.S. 607, 618 (1992). Petitioners have provided no basis to find that their alleged injuries – resulting from intervening decisions by unidentified actors over a broad span of time – were "immediate consequence[s]" of any Holy See "policy."

Because petitioners' commercial activity arguments either have been waived or lack merit, certiorari should be denied.

VI. Certiorari Should Be Denied With Respect to the Constitutional Issues Because Petitioners Have Waived Them

Petitioners' cursory briefing of constitutional issues omits that the court of appeals held that petitioners' constitutional arguments had been waived for failure to raise them in the district court. *See* Pet. App. 16a (holding that "plaintiffs waived their constitutional challenges to the FSIA"); *cf.* Cert. Petition at 31-35.[18]

"This Court . . . is one of final review, not of first view." *F.C.C. v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1819 (2009) (quotations and citations omitted); *see also, e.g., United States v. Oakland Cannabis Buyers Co op.*, 532 U.S. 483, 494 (2001) ("Because the Court of Appeals did not address these claims, we decline to do so in the first instance."). Because petitioners' constitutional arguments were waived and not reached by the court of appeals, the Court should decline to grant certiorari.

CONCLUSION

The petition for writ of certiorari should be denied.

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[18] It is worth noting that the United States government intervened in the court of appeals and took the position that the FSIA was not unconstitutional as applied to the Holy See.

Respectfully submitted,

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